The case of *Duplex Co. v. Deering,* 254 U. S. 443, dealt with the actions of a labor union in attempting a secondary boycott and by that method to coerce customers of the plaintiff from dealing with it—again the use of unlawful or improper means.

The case of *Eastern States Retail Lumber Dealers Association v. United States,* 234 U. S. 600, again involves coercive measures and did not relate to any question of employment or labor. Further, both of these cases dealt with the construction of the Sherman or Clayton Acts, federal statutes which are not involved in this case.

As to the plaintiffs' fifth proposition (pg. 12 of their brief), that a labor union may not be used as the cloak to shield illegal activities, there is no controversy. No contention was or is made that a labor union has any greater rights under the law than any other association of employees or other individuals. Surely, however, the plaintiffs should concede that the laborer has as great a freedom of contract with respect to the sale of his services as the owner of property has with respect to the sale of his property. It is well established that the seller of property may require the buyer to refrain from using it in a certain territory in which the seller continues in business. *Oregon Steam Navigation Co. v. Winsor,* 87 Wall. 64, 68 and 69. Consequently the seller of services should be as free to require the purchaser of his service to refrain from creating competition for the seller of the service.

The principles of common law applicable to this situation, and in the light of which anti-trust statutes are commonly construed, have been clearly established and demonstrate the legality of the purpose and actions of the defendants. As this Court has said (*Duplex Co. v. Deering,* 254 U. S. 443 at 465):

> "The accepted definition of a conspiracy is a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or to

accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means. *Pettibone v. U. S.*, 148 U. S. 197, 203. If the purpose be unlawful it may not be carried out even by means that otherwise would be legal; and although the purpose be lawful it may not be carried out by criminal or unlawful means."

The inquiry thus resolves itself into two aspects,—first the purpose or intent activating and forming the chief objective of the defendants; and, second, the means utilized to accomplish such purpose or objective. As the Court of Appeals has held, the purpose of the defendants was to adjust a valid and bona fide labor dispute, the defendant Union demanding a straight salary, the employers insisting upon a commission basis, the Union finally conceding to the commission basis only upon the condition that the union driver be contractually assured that he would be the only person selling his employer's milk upon his route, and the employer finally acceding to this condition.

The law has been settled for years that a group of employees may, to protect their own interests, require an arrangement with their employer whereby the latter must give them all of his work or they will do none of it. The fact that third persons are injured thereby affords such persons no right of action.

In *Senn v. Tile Layers Protective Union*, 301 U. S. 468, the union of tile layers refused to work for Senn, a tile laying contractor, unless Senn would give them all of his work and agree to refrain from the actual laying of tile himself. Senn sought to enjoin the Union from peacefully picketing his shop in order to enforce this demand. Senn appealed to this Court from an adverse decision of the state courts, claiming that his property was taken without due process, that he had been denied equal protection of the laws, and that his right to work in his own business was guaranteed by the Fourteenth Amendment. This Court affirmed the action of the state courts in denying relief to Senn, stating:

"The end sought by the unions is not unconstitutional * * *. The unions acted and had the right to act as they did to protect the interests of their members against the harmful effect upon them of Senn's action.

"* * *

"There is nothing in the federal Constitution which forbids unions from competing with non-union concerns for customers by means of picketing as freely as one merchant competes with another by means of advertisements in the press, by circulars, or by his window display. Each member of the unions, as well as Senn, has the right to strive to earn his living. Senn seeks to do so through exercise of his individual skill and planning. The union members seek to do so through combination. Earning a living is dependent upon securing work; and securing work is dependent upon public favor. To win the patronage of the public each may strive by legal means. Exercising its police power, Wisconsin has declared that in a labor dispute peaceful picketing and truthful publicity are means legal for unions. It is true that disclosure of the facts of the labor dispute may be annoying to Senn even if the method and means employed in giving the publicity are inherently objectionable. But such annoyance, like that often suffered from publicity in other connections, is not an invasion of the liberty guaranteed by the Constitution. Compare *Pennsylvania Railroad Co. v. United States Railroad Labor Board*, 261 U. S. 72. It is true, also, that disclosure of the facts may prevent Senn from securing jobs which he hoped to get. But a hoped-for job is not property guaranteed by the Constitution. And the diversion of it to a competitor is not an invasion of a constitutional right."

There are many other cases supporting the same proposition. Probably the case most frequently cited is *National Fireproofing Company v. Mason Builders Association*, 169 Fed. 259 (C. C. A. Second Circuit (1909)). The plaintiff company manufactured and installed hollow tile in buildings. The defendant association comprised the bulk of the

mason contractors in the city of New York. The defendant Union comprised substantially all of the bricklayers in the city of New York. The Association and Union had entered into a contract prohibiting the mason contractor from subletting any part of the masonry work on any job where union bricklayers were employed. Consequently, the plaintiff which did not do general masonry but only installed hollow tile could not secure sub-contracts for the installation of tile. Plaintiff sought to enjoin the performance of the contract as constituting a restraint of trade tending to create a monopoly and designed to injure the plaintiff. The trial court dismissed the bill of complaint holding that the test of the legality of the agreement and combination between the mason contractors and union bricklayers was its primary purpose and true object; that since such object was the promotion of the interests of the parties thereto, the agreement and combination was lawful even though incidental injury was suffered by the plaintiff.

The Court of Appeals affirmed, stating:

> "* * * As a general rule it may be stated that, when the chief object of a combination is to injure or oppress third persons, it is a conspiracy; but that when such injury or oppression is merely incidental to the carrying out of a lawful purpose, it is not a conspiracy. Stated in another way: A combination entered into for the real malicious purpose of injuring a third person in his business or property may amount to a conspiracy and furnish a ground of action for the damages sustained, or call for an injunction, even though formed for the ostensible purpose of benefiting its members and actually operating to some extent to their advantage; but a combination without such ulterior oppressive object, entered into merely for the purpose of promoting by lawful means the common interests of its members, is not a conspiracy. A laborer, as well as a builder, trader, or manufacturer, has the right to conduct his affairs in any lawful manner, even though he may thereby injure others. So several laborers and builders may combine for mutual ad-

> vantage, and, so long as the motive is not malicious, the object not unlawful, nor oppressive and the means neither deceitful nor fraudulent, the result is not a conspiracy, although it may necessarily work injury to other persons. The damage to such persons may be serious—it may even extend to their ruin—but if it is inflicted by a combination in the legitimate pursuit of its own affairs, it is *damnum absque injuria.* The damage is present, but the unlawful object is absent. And so the essential question must always be whether the object of a combination is to do harm to others or to exercise the rights of the parties for their own benefit."

The court cites and quotes, from many decisions, excerpts in support of the foregoing, namely, the celebrated English case of *Mogul Steamship Co. v. McGregor,* Law Reports 21 Q. B. 552 and L. R. (1892) A. C. 25 at 56; *National Protective Assn. v. Cumming,* 170 N. Y. 315 at 328 where it is said:

> " 'The struggle on the part of the individuals to prefer themselves, and to prevent the work which they are fitted to do from being given to others, may be keen and may have unhappy results in individual cases; but the law is not concerned with such result, when not caused by illegal means or acts.' "

Vegelahn v. Gunter, 167 Mass. 92; *Allis-Chalmers Co. v. Iron Moulders' Union,* 150 Fed. 155; *Allen v. Flood,* L. R. (1898) A. C. 1, at 164; *Quinn v. Leatham,* L. R. 1901, A. C. 495.

The court further said that the object of the contract was to make the stipulation of the agreement generally effective.

> "* * * The mason builders joining in the agreement being bound by its stipulation, it was necessary for their protection that competing outside builders should only employ bricklayers upon the same conditions. So it was for the advantage of the bricklayers themselves to have means for enforcing uniformity in terms of employment."

The court also indicated that an unlawful combination or conspiracy might exist where the object was lawful but was accomplished by unlawful means, and, therefore, considered whether or not the statements or threats by the union to strike in the event that a mason contractor sublet the fireproofing was the use of unlawful means. In this connection the court said:

> "As indicated in the statement of facts, no threats or acts of intimidation except in connection with the enforcement of clause 5 are shown. Instances do appear, however, in which bricklayers struck and ceased to work because they claimed that work was being done in violation of this clause. So, statements were made by members of the Builders' Association and of the unions that the complainant would not be permitted to take separate contracts for the installation of fireproofing. It is unnecessary to review the acts of the defendants in detail. We are not satisfied that if the defendants or their representatives made threats, they threatened to do anything which they had no right to do. The object of the agreement was not unlawful. The defendants had the right to strike to secure its enforcement. They also had the right to notify the complainant and persons with whom it had dealings that it could not take contracts for the installation of fireproofing contrary to the terms of the agreement without incurring its penalties. But a threat to do that which a person has the right to do is not unlawful. * * *"

This case and the *Senn* case (*supra*) cannot logically be distinguished from the one before the Court. The Union stated in effect to the employer that the employer could take his choice—if he wanted to Union to do his work he must let the union members do all of it or else they would do none of it. This is exactly what the Milk Drivers Union demanded of the defendant dairies, namely, that if the defendant dairies wanted to employ members of the Drivers Union they could only do so upon terms granting the union drivers the right to deliver all of the employ-

er's milk. In the *Senn* and *Fireproofing* cases the only advantage apparently gained by the union was an increase in the volume of the work to be performed by its members and it was held that the attainment of that advantage was a lawful and proper purpose which could be secured by means of the contract. In the present case the Drivers Union was not only interested in securing a larger volume of deliveries but especially of ridding its drivers of a ruinous and unfair competition with which the drivers were powerless to compete and which threatened to curtail the existing volume of work which they had previously enjoyed.

Pickett v. Walsh, 192 Mass. 527; 78 N. E. 753. The plaintiff stone pointers finished the masonry joints of a building, which work was also done by the ordinary bricklayer, but at a higher cost and in an inferior manner. The Union of bricklayers claimed the right to do the pointing, and by agreement provided that no union bricklayer would work on a building unless the union bricklayers were to do the pointing. Since the stone pointers could not do general masonry they were thrown out of employment, although the contractors preferred to use them. Plaintiffs sought an injunction, claiming that the agreement or action of the Union constituted an unlawful combination in restraint of trade. The Supreme Court of Massachusetts held no unlawful combination to exist, but that the bricklayers, being primarily activated by the protection of their own interests, were justified in demanding that they do all of the work, including the pointing, or that they would do none of it. The Supreme Court said:

> "The defendants in effect say we want the work of pointing the bricks and stone laid by us, and you must give us all or none of the work." * * *
>
> "The right which the defendant unions claim to exercise in carrying their point in the course of this competition is a trade advantage, namely, that they have labor which the contractors want, or, if you please, cannot get

elsewhere; and they insist upon using this trade advantage to get additional work, namely, the work of pointing the bricks and stone which they lay. * * * But having regard to the right on which the defendants' organization as a labor union rests, the correlative duty owed by it to others, and the limitation of the defendants' rights coming from the increased power of organization, we are of the opinion that it was within the rights of these unions to compete for the work of doing the pointing and, in the exercise of their right of competition, to refuse to lay bricks and set stones unless they were given the work of pointing them when laid."

The court said that the result of this combination was hard on the contractor who could get the work done cheaper and better by pointers and that "so far as the pointers who cannot lay brick and stone are concerned, the result is disastrous. *But all that the labor unions have done is to say you must employ us for all the work or none of it.*"

"* * * So far as the labor unions are concerned the contractors can employ pointers if they choose, but if the contractors choose to give the work of pointing the bricks and stones to others, the unions take the stand that the contractors will have to get some one else to lay them. The effect of this in the case at bar appears to be that the contractors are forced against their will to give the work of pointing to the masons and bricklayers. But the fact that the contractors are forced to do what they do not want to do is not decisive of the legality of the labor union's acts. That is true wherever a strike is successful. The contractors doubtless would have liked it better if there had been no competition between the bricklayers and masons on the one hand and the individual pointers on the other hand. But there is competition. There being competition, they prefer the course they have taken. They prefer to give all the work to the unions rather than to get non-union men to lay bricks and stone to be pointed by the plaintiffs.

"Further, the effect of complying with the labor unions' demands apparently will be the destruction of the plaintiff's business. But the fact that the busi-

> ness of a plaintiff is destroyed by the acts of the defendants done in pursuance of their right of competition is not decisive of the illegality of them. It was well said by Hammond, *J.*, in *Martell v. White*, 185 Mass. 255, 260, 69 N. E. 1085, 1087, 64 L. R. A. 260, 102 Am. St. Rep. 341, in regard to the right of a citizen to pursue his business without interference by a combination to destroy it: 'Speaking generally, however, competition in business is permitted, although frequently disastrous to those engaged in it. It is always selfish, often sharp, and sometimes deadly.' "

The Court held that while another situation and result might arise if it had been shown that the defendants' combination was formed primarily for the purpose of injuring the plaintiffs that no such situation existed in this case, since the defendants were acting primarily for the purpose of promoting their own interests in getting work from the plaintiffs to which they felt they were legitimately entitled under competitive situations.

Here again, as in the case at bar, the union men stated that if they were going to deliver any of the milk or do any of the masonry they must have all of their employers' work of that type. The case at bar is even stronger than either of the foregoing cases where the masons received a fixed hourly wage but were simply trying to get more work to do. The milk driver, however, was forced to work for a commission and on a route where he was supposed to have the exclusive right to sell his employer's milk. The employer's sales to brokers not only prevented his acquisition of new customers, but tended to and did deprive him of customers or work that he already had.

There are numerous other labor cases of like effect where the courts have held it proper for laboring men, acting primarily for the protection or advancement of their own interests, to require their employer to refrain from an act which would result in giving a certain portion of the work to others, or would deprive the union men of work

which they were capable of performing, even though this resulted in direct injury to third persons. See *Mayer v. Journeymen's Stone Cutters Assn. et al.*, 47 N. J. Eq. 519, 20 Atl. 492; *National Protective Association of Steam Fitters v. Cumming*, 170 N. Y. 315, 65 N. E. 369.

An interesting and applicable case is *Edelstein v. Gillmore*, 35 Fed. (2nd) 723 (C. C. A. (2nd) 1929), Certiorari denied, 75 L. Ed. 650. Equity was a union of some eight thousand actors in New York, which adopted a rule that none of its members could employ a type of agent known as a personal representative except upon certain specified terms and commissions, and that if any such agent had contracts on other terms with any member of Equity, no further contract should be granted him, unless the existing ones were first conformed to the rules so adopted. The plaintiff was such an agent, having contracts with certain actors on terms more favorable to him than were permitted by the rules, which he was unwilling to modify, and therefore could not secure additional contracts of employment. The plaintiff was granted an injunction by the District Court on the ground that the action of the union members was an unlawful combination designed to drive him from business and to interfere with his existing contracts. The Circuit Court reversed. It found that the enforcement of these rules would drive the plaintiff from business unless he complied therewith, but held that since the motive prompting the rules was the controlling factor and that the primary motive or purpose was to promote the interests of the union members and to prevent their exploitation by such agents as the plaintiff, the actions taken by the Union were lawful and proper. The Court said:

> "* * * Hence the requirement that, as a condition to writing new business with Equity's members, old contracts with its members must be made to conform to the new standard, does not seem to us to justify an inference that the primary purpose of the requirement is infliction of injury upon plaintiff, and other

personal representatives in a similar situation, rather than the protection of the supposed interests of Equity's members. The terms they insist upon are calculated to secure from personal representatives a more impartial service, at uniform and cheaper rates, and to improve conditions of employment of actors by theater managers. Undoubtedly the defendants intend to compel the plaintiff to give up rights under existing contracts which do not conform to the new standards set up by Equity but as already indicated, their motive in so doing is to benefit themselves and their fellow actors in the economic struggle. The financial loss to plaintiff is incidental to this purpose. See *Gill Engraving Co. v. Doerr*, 214 F. 111, 120 (D. C. S. D. N. Y.).

"Whether in their relations to personal representatives Equity members are to be deemed a combination of employers, as appellants contend, or a 'labor union,' as appellee insists, is a matter disputed. To us it appears that in fact the policy adopted is aimed at improving their position from both aspects; but whether they be viewed as employers or employees would seem to make no difference. Counsel agree that both employers and laborers may respectively organize to strengthen their bargaining power in the economic struggle, and that the legal principles applicable to each group are the same. The motive of benefit to the industrial group will often justify a collective refusal to deal with one who will not accede to terms which promote the interests of such group, whether it be composed of laborers or of employers. See *Nat. Fireproofing Co. v. Mason Builders' Assn.*, 169 F. 259, 269, 26 L. R. A. (N. S.) 148 (C. C. A. 2); *Nat. Protective Assn. v. Cumming*, 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648; *Bossert v. Dhuy*, 221 N. Y. 342, 117 N. E. 582, Ann. Cas. 1918D, 661; *Wilson v. Hey*, 232 Ill. 389, 396, 83 N. E. 928, 16 L. R. A. (N. S.) 85, 122 Am. St. Rep. 119, 13 Ann. Cas. 82; *Macauley Bros. v. Tierney*, 19 R. I. 255, 33 A. 1, 37 L. R. A. 455, 61 Am. St. Rep. 770; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319; *Booker & Kinnaird v. Louisville Board of Fire Underwriters*, 188 Ky. 771, 224 S. W. 451, 21

A. L. R. 531. We think that that motive supplies justification in the instant case. Therefore, unless we must say that because of Equity's control over the supply of actors in New York City, it is illegal to exercise their combined power against the plaintiff by collective refusal to deal with him until he obtains a permit, we see no basis for the injunction. Whether the welfare of society requires the curtailment of economic power when the group which exercises it is in complete control of a particular industrial or commercial field would seem to be a problem more appropriate for the Legislatures than for the courts. But, in any event, no authority has been cited which appears to require us to hold illegal the threatened refusal of Equity's members to deal with plaintiff except upon the terms proposed. On the contrary, the cases most nearly in point sustain the appellants. See *Tannenbaum v. N. Y. Fire Ins. Exch.*, 33 Misc. Rep. 134, 68 N. Y. S. 342; *City Trust Co. v. Waldhauer*, 47 Misc. Rep. 7, 95 N. Y. S. 222; *Macauley Bros. v. Tierney, supra*; *Am. Livestock Comm. v. Chicago Livestock Exchange*, 143 Ill. 210, 32 N. E. 274, 18 L. R. A. 190, 36 Am. St. Rep. 385; cf. *Boutwell v. Marr*, 71 Vt. 1, 42 A. 607, 43 L. R. A. 803, 76 Am. St. Rep. 746."

There are many other cases from other jurisdictions establishing this general principle that it is within the rights of a labor union to advance the economic interests of its own members by compelling the employers in a community to agree that they will give the members of that union all of their work or additional work even though by so doing third persons are injured or ruined. For example, see *National Protective Association v. Cumming*, 170 N. Y. 315; *Vegelahn v. Guntner*, 167 Mass. 92; *Allis-Chalmers Co. v. Iron Moulders Union*, 150 Fed. 155; *Allen v. Flood*, L. R. (1898) A. C. 1, at 164; *Rosen v. United Shoe and Leather Workers Association*, 287 Ill. App. 49, 4 N. E. (2d) 507; *Gill Engraving Co. v. Doerr*, 214 Fed. 111; *Burnham v. Dowd*, 217 Mass. 351, 104 N. E. 841; *Nissen v. Andress*, Supreme Court of Oklahoma, 1936,

63 Pac. (2d) 47; *P. Reardon, Inc. v. Caton*, 178 N. Y. S. 713 and 178 N. Y. S. 722; *Aeolian v. Fischer*, 27 Fed. (2d) 560; 29 Fed. (2d) 679 and 35 Fed. (2d) 34; *Clemitt v. Watson*, 14 Ind. App. 38, 42 N. E. 367; *Carter v. Oster*, 134 Mo. App. 146, 112 S. W. 995.

CONCLUSION.

In conclusion, therefore, we respectfully submit that no constitutional right of the plaintiffs has been violated. No federal question was either necessary to or has been decided in this case, or properly presented to the Supreme Court of Ohio. Instead, the courts of Ohio, including the Supreme Court of the state, have construed the anti-trust statutes of that state as being inapplicable to the actions of the defendants and that under the common law of Ohio no actionable wrong has been suffered by the plaintiffs. Any attempt to enjoin the performance of a contract expiring on September 30, 1940, prior to the hearing of the plaintiffs' petition, would be abortive so that the case presented is in reality a moot one. No interstate commerce is affected and the generally recognized and established principles of common law sanction the actions of the defendants in protecting the competitive interests of employees through the negotiation of the employment contract in question.

Respectfully submitted,

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